Forwarding Shipping Sdn Bhd v Nusantara Worldwide Insurance (M) Bhd

HIGH COURT (BINTULU) — SUIT NO 22–36 OF 2000 (BTU)
ABDUL AZIZ JC
4 NOVEMBER 2003

Insurance — Marine insurance — Perils of the sea — Assured did not salvage sunken barge — Duty on assured to take reasonable measures to minimize loss — Whether assured taken all reasonable steps to minimize loss by salvaging sunken barge

Insurance — Marine insurance — Perils of the sea — Steel dumb barge sank — Whether sinking caused by perils of the sea — Whether court has to examine proximate cause of loss

Shipping and Navigation — Marine insurance — Hull policy — Perils of the sea — Steel dumb barge sank — Whether sinking caused by perils of the sea or heavy load

Words and Phrases — Perils of the sea — Meaning of

The plaintiff was the registered owner of a steel dumb barge known as 'Autorex 6' and a crane on board 'Autorex 6'. The plaintiff took up a marine insurance policy with the defendant to insure the said 'Autorex 6' and the crane against ordinary risks including the perils of the sea, river, lake or other navigable water. On 25 October 1999, and while the policy was in effect, 'Autorex 6', the crane and a load of timber logs were towed by tugboat from Bintulu to the open sea for off-loading to another ship that was anchored at Kuala Semanok. At the time when the said tugboat and 'Autorex 6' left for the sea, the weather was fine and wind was normal. The weather deteriorated and at 6.30pm, 'Autorex 6' and the crane sank. 'Autorex 6' and the crane were not salvaged and arising from the loss the plaintiff claimed from the defendant under the insurance policy. The plaintiff's case was that the sinking of 'Autorex 6' was caused by the perils of the sea. The defendant disputed the claim.

Held, allowing the plaintiff's claim:

(1) The term 'perils of the sea' was defined in Sch 1 r 7 of the Marine Insurance Act 1906 (UK) as fortuitous accidents or casualties of the seas. It did not include the ordinary actions of the winds and waves. As such, in order to determine whether the cause of the loss was due to peril of the sea or otherwise, the court had to examine the proximate cause of the loss (see paras 30 and 31).

(2) There was a sudden change of sea conditions at Kuala Semanok at about 5.30pm to 6.30pm on 25 October 1999 from the usual calm and normal sea conditions to a heavy storm. No other evidence was adduced to contradict evidence of the plaintiff's witnesses as to the condition of

the sea at the material time. As such, there was sufficient evidence to suggest that 'Autorex 6' sank because of unusual weather and sea condition. Therefore, 'Autorex 6' sank because of the perils of sea (see paras 36 and 45).

(3) Although 'Autorex 6' was laden with about 400 tons of timber logs at the material time, the plaintiff's witness' testimony was that the leadline of 'Autorex 6' was still about two feet about the waterline. In any event it was not shown in evidence that the heavy load had caused the sinking of 'Autorex 6' (see para 39).

(4) Clause 11.1 of the insurance policy imposed a duty on the assured to take such measures that may be reasonable to minimize loss. Although the defendant's witness believed that 'Autorex 6' could be salvaged, there was no evidence led to support it. In any event, the witness' testimony as to the possible success of the salvage operation seemed to be directly opposite to the views expressed by the salvage company. Therefore, there was no breach of that clause as the plaintiff had taken all reasonable steps to minimize loss; which in this instant case, was to try and salvage the sunken 'Autorex 6' (see paras 51, 58 and 61).

[**Bahasa Malaysia summary**

Plaintif merupakan pemilik berdaftar sebuah baj besi dikenali sebagai 'Autorex 6' dan sebuah kren di atas 'Autorex 6'. Plaintif telah mengambil polisi insurans marin dengan defendan untuk menginsuranskan "autorex 6' dan kren terhadap risiko-risiko biasa termasuklah bahaya lautan, sungai, tasik atau lain-lain air yang boleh dilayari. Pada 25 Oktober 1999, semasa polisi itu masih berkuat kuasa, 'Autorex 6', kren dan muatan kayu balak telah ditunda oleh bot tunda daripada Bintulu ke laut luas untuk dimuatkan ke kapal lain yang berlabuh di Kuala Semanok. Semasa kapal tunda berlepas ke laut, cuaca adalah baik dan angin adalah normal. Cuaca berubah menjadi buruk dam pada 6.30 petang, 'Autorex 6' dan kren telah tenggelam. 'Autorex 6' dan kren tidak diselamatkan dan berpunca daripada kehilangan itu, plaintif telah menuntut daripada defendan di bawah polisi insurans. Kes plaintif adalah 'Autorex 6' tenggelam disebabkan oleh bahaya lautan. Defendan mempertikaikan tuntutan itu.

Diputuskan, membenarkan tuntutan plaintif:

(1) Terma 'bahaya lautan' telah didefinisikan di Jadual 1 k 7 Akta Insurans Marin 1906 (UK) sebagai kemalangan secara kebetulan atau nahas dilautan. Ia tidak termasuk keadaan-keadaan biasa angin dan ombak. Oleh itu, untuk menentukan sama ada sebab kehilangan adalah disebabkan oleh bahaya lautan atau sebaliknya, mahkamah perlulah memeriksa sebab langsung kehilangan itu (lihat perenggan 30 dan 31).

(2) Terdapat perubahan secara mengejut keadaan lautan di Kuala Semanok lebih kurang pukul 5.30 petang ke 6.00 petang pada 35 Oktober 1999 daripada keadaan laut yang kebiasaannya tenang dan normal kepada ribut kencang. Tiada keterangan lain yang dikemukakan untuk menyangkal keterangan saksi plaintif berkenaan dengan keadaan laut pada masa material itu. Oleh itu, terdapat keterangan yang mencukupi untuk menyarankan bahawa 'Autorex 6' tenggelam disebabkan keadaan cuaca dan laut yang tidak menentu. Oleh yang demikian, 'Autorex 6' tenggelam disebabkan bahaya lautan (lihat perenggan 36 dan 45).

(3) Walaupun 'Autorex 6' dimuatkan dengan 400 tan kayu balak pada masa yang material itu, testimoni saksi plaintif garisan penunjuk 'Autorex 6' masih lebih kurang 2 kaki daripada paras air. Di dalam sebarang keadaan, tidak ditunjukkan di dalam keterangan bahawa muatan berlebihan telah menyebabkan 'Autorex 6' tenggelam (lihat perenggan 39).

(4) Klausa 11.1 polisi insurans mengenakan kewajipan kepada pengambil insurans untuk mengambil langkah-langkah yang sewajarnya untuk mengurangkan kehilangan itu. Walaupun saksi defendan percaya bahawa 'Autorex 6' boleh diselamatkan tiada keterangan untuk menyokong kepercayaannya. Di dalam sebarang keadaan, testimoni saksi berkenaan kemungkinan kejayaan operasi menyelamat nampaknya secara langsung, bertentangan dengan pandangan yang dikemukakan oleh syarikat menyelamat. Oleh yang demikian, tidak terdapat perlanggaran klausa itu kerana plaintif telah mengambil langkah-langkah yang sewajarnya untuk mengurangkan kehilangan itu; di mana di dalam kes ini, adalah untuk mencuba dan menyelamatkan 'Autorex' yang tenggelam (lihat perenggan 51, 58 dan 61).]

Notes

For cases on marine insurance, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 198–200, 184-186.

Cases referred to

British and Foreign Marine Insurance Co v Gaunt (1921) All ER 447 (refd)
CCR Fishing Ltd & Ors v Tomenson Inc & Ors; 'The La Pointe' (1989) 2 Lloyds Rep 536 (refd)
Fraser v BN Furman (Productions) Ltd [1967] 3 All ER 57 (refd)
Gaunt v British and Foreign Insurance Co Ltd and Standard Marine Insurance Company Ltd (1920) 1 KB 903 (refd)
Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd (1918) AC 350 (refd)
Marel, The [1994] 1 Ll LR 624 (refd)
'*Melanie*' [1984] 1 MLJ 260 (refd)
Mountain v Whittle (1921) All ER 626 (refd)

Pandong v Hamilton 16 QBD 629 (refd)
Solicitor, In Re A [1945] 1 All ER 445 (refd)
Thames and Mersey Marine Insurance Co Ltd v Hamilton, Fraser & Co; 'Inchmaree' [1887] 12 AC 484 (refd)
Thomas Wilsons, Sons & Co v The Owners of the Cargo Per The 'Xantho' [1887] 12 App Cas 503 (refd)

Legislation referred to

Companies Act 1965
Marine Insurance Act 1906 [UK] s 78(4), Sch 1 r 7

George Lim (Battenberg & Talma) for the plaintiff.
Lee Bee Teck (Tang & Tang, Wahap) for the defendant.

Abdul Aziz J:

[1] The plaintiff is a company incorporated in Malaysia under the Companies Act 1965. It was the registered owner of the steel Dumb Barge known as 'Autorex 6' and also of the P & H 330 crane on board the said 'Autorex 6'. The plaintiff took up a Marine Hull Insurance Policy No 99BTDH000004/HHHI/R100 dated the 26 March 1999 with the defendant to insure the said 'Autorex 6 and the crane' against ordinary risk including the perils of the sea, river lake or other navigable water for RM200,000 in respect of the said 'Autorex 6' and RM180,000 for the crane.

[2] On 25 October 1999 and while the policy was in effect, 'Autorex 6 with the crane' and a load of timber logs was towed by Tug Boat Mark No 5 from Bintulu to the open sea for off loading to another ship that was anchored at Kuala Semanok. At the time when the said Mark No 5 and the Autorex 6 left for the sea the weather was fine and wind was normal. The weather deteriorated and at 6.30pm. 'Autorex 6 with the crane' sank. The said 'Autorex 6 and the crane' were not salvaged and arising from the loss the plaintiff claimed from the defendant under the policy.

[3] The defendant disputed the claim. The defendant did not admit 'Autorex 6' sank on the 25 October 1999 at Kuala Semanok, Bintulu. The defendant also denied that Autorex 6 sank not because of 'perils of the sea'. Further the defendant alleged that the plaintiff breached their obligation under cl 11 of the policy and so the plaintiff was not entitled to claim.

[4] At the commencement of the trial, the following documents were marked:

(a) Bundle of Pleadings - A
(b) Agreed Bundle (1) - B
(c) Agreed Bundle (2) - C
(d) Non Agreed Bundle - D

[5] PW1 was the first witness for the plaintiff. He was the juragan (Master) of the tugboat Mark No 5 that was towing the barge Autorex 6 at the material times. In his evidence-in-chief, PW1 said that he left Bintulu for open sea at about 3pm on the 25 October 1999. He was then in command of the tugboat Mark No 5 and was towing the barge Autorex No 6. The barge then was loaded with timber logs. PW1 said when he left Bintulu for the open sea the weather was fine. But slowly the winds became stronger at about 4.45pm. PW1 said he called his 'towkay' to request for help of another tugboat. At that time PW1 said the wind was very strong with big waves. PW1 said the barge Autorex 6 sank before the arrival of the tugboat that he had called.

[6] During cross-examination, there was an attempt by the counsel for the defendant to challenge the PW1's testimony. But PWI was steadfast in his story and was not shaken. In cross-examination, PW1 said he was a master of coastal shipping and produced a certificate of his competency at p 9 of the Agreed Bundle B. He said he was familiar with the routes in Kuala Semanok and in one year he did more than 20 trips. PW1 testified that he was familiar with the sea conditions, and that he was also familiar with the weather condition at Kuala Semanok in November and December which PW1 described as normally fair around November and October. But PW1 testified that at the material times the weather was exceptionally bad. When PW1 was re-examined on the weather condition at Kuala Semanok at the material times, PW1 said that 'after making 20 trips a year in Kuala Semanok, I have a experience to decide whether it is safe to navigate Kuala Semanok'. PW1 further said that he had never encountered such bad weather before.

[7] The claim by PW1 that at the material times there were strong winds and big waves at Kuala Semanok was not contradicted. PW2, the weatherman, in his evidence said that the analysis of the weather at p 13 of Agreed Bundle C (AB2) is the general condition of the wind and sea at Kuala Semanok on 25October 1999. PW2 said that based on his analysis, there was no thunderstorm or rain over Kuala Semanok, in Bintulu on 25 October 1999. But PW2 also said:

> I can't analyse the wind and sea condition at specific time at Kuala Semanok. In order to do that we have to perform continuous measurement. In this case there was no such data. On analysis I can't identify waves and wind condition at Kuala Semanok at 6.30 on 25 October 1999.

[8] PW2 also commented on PW1's evidence of the weather that he (ie PWI) experienced then when PW2 said in his examination in chief:

> Looking at the analysis, it would be difficult to say whether what PWI told the court that he experienced increase in wind 4.30pm onwards exceptional weather at 6.30pm because such event would be localised and cannot be picked up by satellite picture. But it is possible it happened because the satellite picture shows at 6.25pm that it was cloudy.

[9] Then PW2 added by saying that if a thunderstorm had occurred at that time, the waves would have been high — about 6–9ft and wind speed up to 40 knots which is about 80km per hour.

[10] Under cross-examination, PW2 again said that the possibility of thunderstorm at Kuala Semanok is there. PW2 testified that on a large scale the weather around Kuala Semanok was cloudy. PW2 was also very affirmative when he said that in a storm the wind speed would be 20–40 knots and waves about 2–3m high (which is about 6–9ft high).

[11] PW3 was at the material times a crane operator working for the plaintiff. He was then a sea-based crane operator: that means he operated the crane that was mounted on the centre deck of Autorex 6. PW3 testified that he had been operating the crane on Autorex 6 for about five years to the date of the incident. PW3 said on 25 October 1999 at about 3pm. Autorex 6 was loaded with timber logs and was on the way to open sea from Bintulu. The purpose was to load the timber logs to a ship, which was berthed at Kuala Semanok. PW3 testified that the distance between mouth of Bintulu river and the ship was about three hours by barge when towed. At that time, according to PW3 the weather was fine. PW3 also said he loaded the timber logs onto Autorex 6 himself using the crane on the Autorex 6. He loaded the timber logs the day before and it took him six hours to complete the loading. PW3 said after he finished loading the water limit was still below the loadline and the leadline was about two feet to the deck of Autorex 6.

[12] PW3 said that after the loading, the P&H crane remained on board Autorex 6 because it would be used again to unload the timber logs from the barge onto the waiting ship at Kuala Semanok.

[13] As to the loading of the timber logs on to the Autorex 6, PW3 gave evidence that the barge Autorex 6 had a flat deck. The timber logs were stacked up in the same direction on Autorex 6 in two compartments. One in the front and the other at the back of the barge. The large logs were stacked in the front deck and the smaller and shorter one at the back. The timber logs were stacked up to 14ft in the front deck and up to 16ft in the hind deck.

[14] PW3 also testified that once the timber logs had been stacked, the stack was secured to the barge's deck by lashing the timber logs with ropes. These ropes were tied to the stensions — there were six of them on both sides at the front deck and seven of them on both sides of the hind deck. The height of the stensions were extended by using log pole; and on that day it was extended up to 18ft in height. PW3 said the lashing was to prevent the logs from rolling and that the logs were firmly secured to the barge.

[15] As to the weather, PW3 testified that at about 5pm there was strong wind and it also raining heavily. PW3 said at that time the waves were about 6–7ft. PW3 said that at that time he was already half way to the ship. PW3

testified that the change in weather surprised him and that he never encountered such bad weather.

[16] Under cross-examination, PW3 said Autorex 6 was about 140ft long and 40ft with and had a depth of about 10 feet. The size of the timber logs that were loaded varies. The large one was about 70–80ft with diameter of 4–5ft and the smaller one was about 30–40ft long with diameter of 1–2ft. The crane was positioned in the middle of the barge and it occupied about 20ft of the deck space.

[17] When the learned counsel for defendant asked PW3 about the listing of the Autorex 6, PW3 answered:

> The barge was out listing when I encountered bad weather:
>
> Q: When did the barge listed.
>
> A: Because of the strong waves, the barge was rolling and suddenly it listed on the left side and portside.

[18] PW3 also said that the tugboat Kompas 2 could not save Autorex 6 because when it arrived at the scene, Autorex 6 was already sinking.

[19] PW4 was the final witness for the plaintiff. He was the Managing Director of the plaintiff. He told the court that plaintiff's business is to transport logs by rivers and seas. He also said that the plaintiff used barges and tugboats to transport the logs. PW4 said that Autorex 6 was owned by the plaintiff. PW4 identified the document at pp l–2 of the Agreed Bundle B as the registration of the Autorex 6 and the document at pp 18–37 of Agreed Bundle B as the insurance policy. PW4 testified that the policy on the barge was for RM200,000 and for the crane it was RM180,000.

[20] In his examination in chief, PW4 said the juragan (ie PW1) called him over the Atur Phone requesting for another tugboat Kompas 2 to assist him (the juragan) because of heavy rain and rough sea. PW4 also told the court that when PW1 called him, he told PW1 to turn back if the weather is bad. But according to PW4, the juragan (PW1) told him, that he (PW1) could not turn back as the weather was getting worse, ie the sea condition at Kuala Bintulu. This piece of evidence was never challenged.

[21] PW4 said he wrote to the defendant on 26 October 1999 informing the defendant about the casualty. Thereupon the defendant appointed Mestari Sdn Bhd as the adjusters. On 4 November 1999, Mestari Sdn Bhd wrote to the plaintiff attaching a quotation from Manyplus Salvage Sdn Bhd on 'no cure-no pay basis'. Manyplus Sdn Bhd quoted the salvage cost at RM130,000 for the barge Autorex 6 and RM70,000 for the crane with two conditions. The first condition is that payment is to made directly by the insurance company, ie the defendant and secondly, the defendant must give a letter of undertaking as to the payment and the owner to give consent to commence salvage works.

[22] According to PW4, he found the price quoted by the salvor too high. So he wrote to the Adjusters Mestari and was told to negotiate the price and terms of the salvage directly with the salvor.

[23] Plaintiff then wrote a letter (at p 4 of Bundle C) to the salvor to lower the price. But the salvor replied in letter (at p 5 of Bundle C) that it could not do so.

[24] PW4 then testified that he informed the adjuster about the salvor reluctance to lower its price and also told the adjuster to follow up on the matter because no one was willing to quote on 'no cure-no pay basis'. PW4 also said he told the adjusters Mestari to expedite things because of lost of business and income. PW4 also testified that he wrote a letter (at p 6 of Bundle C) to the defendant informing the defendant that one month has passed by but nothing was done; and that no salvage company in Bintulu has the necessary equipments to carry out salvage works. But PW4 said the defendant never replied to his letter. PW4 testified that later he received a letter from the defendant (at p 15 of Bundle B), the first letter from defendant, and the defendant accused the plaintiff of not taking any action. It is also in PW4 evidence that he wrote to the defendant on 24 March 2000 in reply to the defendant's letter as to the letter of undertaking requested by the salvor Manyplus Sdn Bhd in its quotation.

[25] PW4 further testified that after the sinking of Autorex 6, he did approach some friends and companies to do the salvage work. But they do not have the necessary equipments. Furthermore, PW4 said the charges were also the same and the terms was cash payment.

[26] In cross-examination, PW4 testified that he bought Autorex 6 in 1995. PW4 said from 1995–1999 there was a survey done on Autorex 6. The main survey was done every three years. According to PW4, when he took the Marine Hull Insurance on Autorex 6 in 1999, a survey was done but no valuation.

[27] On the evidence I find that Autorex 6, the steel dumb barge together with the P & H crane on board sank at 6.30pm at Kuala Semanok Bintulu.

[28] I also find that at the time it sank, the Autorex 6 and the crane were covered by a valid Marine Hull Insurance Policy dated 26 March 1999 issued by the defendant against ordinary risk including the perils of the seas, rivers, lakes, or other navigable water for RM200,000 in respect of the barge and RM180,000 for the crane. This fact was not disputed by the defendant.

[29] The question now is whether the sinking of the Autorex 6 and the crane was caused by the perils of the sea. In this case the plaintiff claimed that the sinking of the barge Autorex 6 was caused by the perils of the sea.

[30] The term 'perils of the sea' is defined in Sch 1 r 7 of the Marine Insurance Act 1906 (UK) referring only to fortuitous accidents or casualities

of the seas and does not include the ordinary actions of the winds and waves. The term also has been subject to various definitions by the courts. To cite a few, they are as follows: In *CCR Fishing Ltd & Ors v Tomenson Inc & Ors* ('*The La Pointe*') [1989] 2 Lloyd's Rep 536, the ship 'The La Pointe' sank due to an ingress of sea water through an open sea suction valve which the crew had negligently failed to close. In that case, the Court of Appeal cited with approval the proposition in *The Bamcell II* [1986] 2 Lloyd's Rep 528 which states that perils of the sea be restricted to fortuitous accidents or casualities of the sea. In *Bamcell II*, the court said that the accident must be fortuitous first in the sense that it is not caused intentionally by the assured and, second, in the sense that it is not the inevitable result of deterioration caused by normal action of wind, waves and time. The accident also must be, of the seas in the sense, at least, that the damage is damage that would not have occurred in an accident on land, such as damage by sinking, or by foundering following a collision at sea or striking a rock. In '*La Pointe*', the Court of Appeal disagreed with the finding of the court of the first instant that the unintentional ingress of sea water in '*La Pointe*' whereby the vessel sank causing loss is peril of the sea. In that case the Court of Appeal found that the improper use of the mild steel cap screws to close the valve and the failure to close the sea suction valve were remote and not proximate cause of the sinking of La Pointe. At p 544 of the report, Macdonald J said:

> ... I am of the view that it is unsound proposition that any loss caused by the unintentional ingress of sea water is caused by a peril of the sea. Unintentional ingress of sea water is more an effect than a cause. Once the water starts coming in, the only determining fact or whether the vessel sinks or not in the volume of water sinking. What must be sought in the cause of the ingress of water.

[31] At the end of the his judgment, the same learned judge concluded at p 543 that:

> My opinion … is that the proximate cause of the ingress of water was the corroded condition of the cap screws, which were intended to keep the flange watertight. It was not a fortuitous accident or casualty of the seas. The loss therefore was not cause by perils of the sea.

[32] What can be deduced from the decision in '*La Pointe*' is that in order to determine whether the cause of the loss was due to peril of the sea or otherwise the court has to examine the proximate cause of the loss [see also the speech of Lord Shaw in *Leyland Shipping Company Limited v Norwich Union Fire Insurance Society Limited* (1918) AC 350 cited and quoted in '*La Pointe*'.

[33] In *Thomas Wilsons, Sons & Co v The Owners of the Cargo Per The 'Xantho'* (1887) 12 App Cas 503, Lord Herschell said at p 509:

> I think it clear that the term 'perils of the sea' does not cover every accident or casualty which may happened to the subject matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or

damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding.

[34] In *Thames and Mersey Marine Insurance Co Ltd v Hamilton, Fraser & Co 'Inchmaree'* (1887) 12 AC 484, it was held that whether the injury occurred through negligence or accidentally without negligence it was not covered by the policy, such a loss not falling under the words 'perils of the sea' nor under the general words 'all other perils, losses, and misfortunes that have or shall come to the hurt detriment or damage the subject matter of insurance'. In that case also, L Bramwell referred to the definition of Lopes LJ in *Pandong v Hamilton* 16 QBD 629 and cited it with approval when he said, at p 633:

I think the definition of Lopes LJ in *Pandong v Hamilton* is very good: 'In a seaworthy ship damage to goods caused by the action of the sea during transit not attributable to the fault of anybody', is a damage from a peril of the sea.

[35] In other words, to come within the ambit of perils of the sea the cause of the accident must be due to something extraordinary or unexpected conditions of the sea. It is not a peril of the sea if the accident is caused by ordinary action of the winds and waves. In the case of the *Melanie* [1984] 1 MLJ 260, Salleh Abas CJ (Malaya) after referring to *Halsbury's Laws of England* (Vol 25, 4th Ed) para 153 at p 93, said that the unexpectedness of the peril due to the action of the sea is the main element of the concept and that perils of the sea is a peril due to the sea and it refers only to fortuitous accidents or casualties of the sea so that damage could not be expressly guarded against. Thus the accident is not due to the peril of the sea if the vessel sank due to poor handling or navigation under normal and ordinary condition of the sea. Nor is the accident caused by perils of the sea if the vessel sank due to sea water entering the vessel in normal condition of the sea owing to the defective character of the seams which goes to the conditions of the vessel.

[36] In this case, I find that on the evidence of PW1 and PW3 there was a sudden change of sea conditions at Kuala Semanok at about or around 5.30pm to 6.30pm on the 25 October 1999 from the usual calm and normal sea conditions to a heavy storm.

[37] Though the evidence of PW2 showed that the weather forecast for Kuala Semanok at the material times was generally fair, PW2 also said that if there is a localised storm, the weather report would not be able to show it because such incidents are unable to be captured by satellite which PW2 depends

on to prepare his weather forecast report. It is also pertinent to note that PW2 said in preparing the weather forecast as the one he had done for this case he also relied on reports by merchant ships plying the routes besides the satellite pictures and imagery or readings. But in this particular instance there was no report from merchant ships. As such the weather forecast report by PW2 in this case would not had the benefit of the information of the actual conditions of the seas based on reports from the ships. PW2 also did not rule out the possibility of a local storm at the material times.

[38] PW1 and PW3 also said in evidence that when they encountered the rough seas the Autorex 6 and the tugboat Mark 5 that was towing Autorex 6 were pitching and rolling, so much so that PW1 had to call his 'towkay' to send another tugboat the *Compass 2* to assist him. PW3 said in evidence that at about 5pm the waves were about 6–7ft high and at 6pm they were about 10ft high. This evidence is consistent with PW2's opinion when he said in evidence that if a thunderstorm occurs, the waves would be high — about 6–9ft high and wind speed at about 40 knots is equivalent to 80km/hr.

[39] I have also considered the fact that Autorex 6 at the time of the accident was laden with about 400 ton of timber logs, which was slightly above the permissible load for Autorex 6. But even with that load, PW3 said that Autorex 6 leadline was still about 2ft about the waterline. In any event it was not shown in evidence that the heavy load caused the sinking of the Autorex 6. There is however evidence to show the rope that was used to lash the timber logs and kept them secured on the deck of Autorex 6 was broken during the encounter with the heavy seas. But there is also evidence that the rope was still in good condition at the time. PW3 in his testimony said that he was the crane operator at that time and was operating the P&H crane on Autorex 6. The crane was used to load the timber logs on the deck of Autorex 6. PW3 said that loading of the timber logs was done by him personally. PW3 said he used ropes to lash the logs once they were on the Autorex 6. The rope, according to PW3 testimony has been used for 2–3 months and still can be used; and that the ropes were normally changed every one to two years. PW3 also said the lashing of the logs with the ropes was done by him personally.

[40] There was an attempt by the defence to show the timber logs rolled on the Autorex 6 during the storm and that caused the lashing to break and the timber logs rolled to one side and caused it to sink. But in my view, the contrary is more probable in that the storm and the heavy seas with big waves as high as 6–10ft caused the Autorex 6 to roll and pitch — something which PWI and PW3 never expected to happen or could not have expected to happen at that time of the year in Kuala Semanok. In my view it is more probable that the heavy rolling and pitching of the Autorex 6 due to the rough seas caused the ropes that lashed the timber logs to break. When PW3 was questioned by the learned counsel on whether the barge Autorex 6 was listing in the bad weather PW3's answer was as follows:

The barge was not listing when I encountered the bad weather.

Q: When did the barge list?

A: Because of the strong waves, the barge was rolling and suddenly it listed on the left side and port side.

[41] PW3 also denied the suggestion by learned counsel for the defendant that the rolling of the timber logs on the deck of the Autorex 6 could cause the sinking of the barge. When cross-examined by learned counsel for defendant, PW3 said:

The timber logs did not roll. The timber logs and the crane just went down at the same time.

Q: The logs were lashed, so how could it have happened?

A: When the timber logs together with the crane rolled down, the barge also sank at the same time.

[42] In *Mountain v Whittle* (1921) All ER Rep 626, a houseboat named 'Dorothy' sank when it was being towed by tug named 'Dorrington' which was larger and disproportionate in size and power to the vessel that was being towed. The sinking of *The Dorothy* was caused, by the unusual height of the 'breast wave', thrown up by *The Dorrington* and *The Dorothy* together which caused the water to reach the top side seams of *The Dorothy*, invade the interior through the seams, and caused *The Dorothy* to sink. On the facts, L Birkenhead LC said at pp 628–629:

I have made it plain that there are concurrent findings of fact in the courts below to the effect that the unusual size of the breast wave either caused the entry of the sea water or effectively contributed to its entry. I see no reason for differing from these findings, and I adopt them as the basis of the conclusion which I have reached. In my opinion, the nature of this wave constituted a 'sea peril'. The elements which are necessary to form a sea peril have frequently been collected and explained in this House. But it is no longer necessary, unless for the purposes of illustration, to go further than the statutory provisions of the Marine Insurance Act 1906, that the term 'perils of the seas' refers only to fortuitous accidents or casualties of the seas, and does not ordinary action of winds or waves. In my opinion, the incidence and dimensions of the wave in question amounted to a fortuitous casualty of the seas and were not accounted for merely by the ordinary action of winds or waves. Upon the first point, therefore, I reach the conclusion that the loss was caused by a peril insured against.

[43] And at p 632, Viscount Finlay said:

It is, however, necessary for the assured to establish that the loss was due to a peril of the seas. If the water was in a normal condition and got into the houseboat simply owing to the defective character of the seams there would be no loss by peril of the seas — the loss would have been by the defective condition of the vessel. A loss caused by the entrance of sea water is not necessarily a loss by perils

of the seas. There must be some special circumstances, such as heavy waves causing the entrance of the sea water, to make it a peril of the seas. Was there such a peril here? Both Bailhache J, and the Court of Appeal find that there was, and upon the evidence I cannot doubt that they were right. It seems to be quite clear that *The Dorothy* was exposed to a wash of an extraordinary character from the great size and power of *The Dorrington*, the tug to which she was lashed. The breast wave so occasioned amounted to a peril of the seas just as much as if it had been occasioned by a high wind. No attempt was made on behalf of the underwriters to show that the water would have made its way into the houseboat to the same extent if the wash and breast wave had been normal. The wash occasioned by passing vessels at sea may constitute a peril of the seas if of an extraordinary character, and if the wash here was occasioned by something abnormal in the strength and size of the tug or the mode of towage it was equally a peril of the sea. The fact that it was due to some negligence in the management of the vessel on the part of those to whom the owner had confided her does not prevent such an accident being covered by the policy.

[44] And at p 634, Lord Summer said:

> In fact, my own conclusion would be the same, for the bow wave must have been indeed an exceptional one for 4ft of water in 100 minutes' towing at a moderate speed to have been forced through seams which were not open enough to have attracted attention, and sinking by such a wave seems to me a fortuitous casualty. Whether formed by passing steamers or between tug and tow, it was beyond the ordinary action of wind and wave, or the ordinary incidents of such towage.

[45] It can be seen from the above passages of the judgments of the Law Lords that the court was unanimous in its conclusion that waves of unusual character ad size, even though not caused by high winds could constitute a sea peril. As I see it, so long as the waves are not the result of ordinary action of winds or waves it could amount to a fortuitous casualty of the seas. In this instant case, besides the evidence of PW2, no other evidence was adduced to contradict the evidence of first hand experience of PW1 and PW3 as to the condition of the sea at the material times. Though PW2 generally said that the whether was normal, he did not rule out the possibility of local storm at Kuala Semanok at the time of the year. I think there is sufficient evidence in the testimony of PW1 and PW3 to suggest that the Autorex 6 sank because of unusual weather and sea condition with extraordinary size waves of 6–9ft that caused the Autorex 6 to roll and pitch and eventually sank. In my opinion, the kind of weather and sea condition experienced by PW1 and PW3 on the fateful day is something that is beyond the ordinary or normal action of winds and waves. Thus, it is my finding that the rough sea and bad weather condition with winds speeds about 20–40 knots and big waves or high as between 6–9ft that caused the Autorex 6 to roll and pitch heavily is the proximate cause of the sinking. Therefore in my view the Autorex 6 sank because of the perils of the sea.

[46] Learned counsel for the defendant cited *The Marel* [1994] 1 LI LR 624, for the proposition that the burden of proving, on a balance of probabilities,

that a ship was lost by perils of the sea is and remains throughout on the owner. In *The Marel*, the vessel sank because sea water had entered its engine room through a breach in the vessel's shell plating below the still waterline on the portside of the vessel just off the engine warm bulkhead, which the plaintiff claimed was caused by the vessel collision with a floating object which was submerged. But on the evidence the trial judge found as a fact that it was wholly improbable that entry of sea water into the engine room was due to such collision. The plaintiff in *The Marel* also claimed that the vessel was sea worthy when she set out for seas. On appeal by the plaintiffs, the Court of Appeal in *The Marel* concurred with the finding of the trial judge and held that the trial judge was entitled, on evidence, to make such finding of fact. However the Court of Appeal also held that if it was known that a ship was sea worthy when set out, and nothing was heard of her or her crews since, then on the balance of probabilities, she must have sank and the sinking must, on the balance of probabilities have been due to 'perils of the seas' since she was sea worthy then. This is the presumption, and a rebuttal one. But the Court of Appeal also said that the presumption does not apply if the vessel is shown to be unseaworthy.

[47] On the application of the principle in *The Marel* to the instant case learned Counsel for the plaintiff submitted that the case of *The Marel* does not support the defendant's submission that the burden of proof is on the plaintiff as owner of the barge to prove that the barge is 'seaworthy' before a loss can come within the ambit of 'peril of the sea'. Learned Counsel for the plaintiff submitted that all that case held was that the burden is and remains throughout on the owner to prove on balance of probability that a ship was lost by 'peril of the sea', a burden which the plaintiff had proven on a balance of probability. Learned Counsel for the plaintiff further submitted that 'seaworthy' was raised in *Marel*'s case only in reference to the situation where the insured was relying on the 'presumption or the inference' which the insured wished the court to make when the ship had disappeared at sea and it was shown that the ship was seaworthy when she set out on her last voyage, then on a balance of probability her loss was by peril of the sea. *The Marel*'s case was not based on a claim that the loss was the result of it encountering exceptional bad weather but that water entered the vessel because the ship hit a submerged object that was not established. For that reason, the court held there it was for the plaintiff to establish a case of loss by 'Peril of the Sea' by advancing cogent explanation for the ingress of seawater.

[48] I agree with the submissions by the learned counsel for plaintiff on the point. The plaintiff here was not relying on the 'presumption or inference' at all and hence there was no need to establish she was seaworthy when it set out. On the other hand, the plaintiff had established that the loss was fortuitous accident in that it met adverse weather condition that was totally unexpected and sudden. The unchallenged evidence of PW1 and PW3 fortified the

exceptional weather and the suddenness in which it was encountered causing pitching and rolling which eventually led the logs fastening to break and the logs to rolled over board and the eventual sinking of the barge. I may add that neither the plaintiff nor the defendant pleaded the fact of seaworthiness or otherwise of the Autorex 6 in the pleadings. Therefore, this fact is a non-issue and the presumption in *The Marel* does not apply. In any case, the attempt to show the unseaworthiness of the Autorex 6 through cross-examination of PW4 fails miserably. There is hardly any evidence to show that the Autorex 6 was unfit for seas on the material day.

[49] In my view, having regards to the authorities cited, the plaintiff burden in the instant case is to show that the proximate cause of the sinking of the Autorex 6 is due to 'perils of sea'. In this regard I am of the view that this burden has been discharged through the evidence of PW1 and PW3 as to the exceptionally bad weather and rough conditions of the sea coupled with the size of the waves and the speed of the winds which were extraordinary and uncharacteristic of that normally experienced at Kuala Semanok at similar time of the year. It is a casualty that is covered under cl 6.1 of the policy.

[50] Next, I will consider whether the plaintiff has breached cl 11.1 of the policy and thus is prevented from recovering under the policy. Clause 11.1 of the policy reads as follows:

> In case of any loss or misfortune it is the duty of the Assured and their servants and agents to take such measures as may be reasonable for the purpose of averting or minimising a loss which would be recoverable under this insurance.

[51] It is obvious that cl 11.1 imposes a duty on the assured to take such measures that may be reasonable to minimize loss. What then is the scope of this duty.

[52] In *Re A Solicitor* (1945) 1 All ER 445 at p 446, Scott LJ said:

> The word 'reasonable' has in law the prima facie meaning of reasonable in regard to those existing circumstances of which the actor, called on to act reasonably knows or ought to know.

[53] And in *Fraser v BN Furman (Productions) Ltd* [1967] 3 All ER 57, a condition in the Insurance policy stipulates that the insured should take 'reasonable' precaution to prevent accident and disease. In that case Diplock LJ (as he then was) said, at p 60:

> There are three considerations to be borne in mind on the wording of this condition: (i) it is the insured personally who must take reasonable precautions. Failure by an employee to do so, although, the employer might be liable vicariously for the employee's negligence or breach of statutory duty, would not be a breach of the condition. That was established in, and was the *ratio decidendi* of, *Woolfall & Rimmer Ltd v Moyle & Anor*; (ii) the obligation of the employer is to take precautions to prevent accidents. This means in my view to take measures to avert dangers, which

are likely to cause bodily injury to employees; (iii) the third word to be construed in this context is 'reasonable'. 'The insured shall take reasonable precautions to prevent accidents'. 'Reasonable' does not mean reasonable as between the employer and the employee. It means reasonable as between the insured and the insurer having regard to the commercial purpose of the contract, which is inter alia to indemnify the insured against liability for his (the insured's) personal negligence. That, too, is established by the case that I have cited. Obviously the condition cannot mean that the insured must take measures to avert dangers which he does not himself foresee, although the hypothetical reasonably careful employer would have foreseen them. That would be repugnant to the commercial purpose of the contract, for failure to foresee dangers are one of the commonest grounds of liability in negligence. What in my view is 'reasonable' as between the insured and the insurer, without being repugnant to the commercial object of the contract, is that the insured should not deliberately court a danger, the existence of which he recognised, by refraining from taking any measures to avert it. Equally the condition cannot mean that, where the insured recognises that there is a danger, the measures which he takes to avert it must be such as the hypothetical reasonable employer, exercising due care and observing all the relevant provisions of the Factories Act 1961, would have taken. That, too, would be repugnant to the commercial purpose of the contract, for failure to take such measures is another ground of liability in negligence for breach of statutory duty.

What in my judgment is reasonable as between the insured and the insurer, without being repugnant to the commercial purpose of the contract, is that the insured, where he does recognise a danger, should not deliberately court it by taking measures which he himself knows are inadequate to avert it. In other words, it is not enough that the employer's omission to take any particular precautions to avoid accidents should be negligence; it must be at least reckless, ie made with actual recognition by the insured himself that a danger exists, not caring whether or not it is averted. The purpose of the condition is to ensure that the insured will not refrain from taking precautions which he knows ought to be taken because he is covered against loss by the policy.

[54] Now *Eraser*'s case further held where the insurer has denied liability under policy the onus in on the insurer to prove that the condition does not apply.

[55] It is for defendant then to show affirmatively that the plaintiff acted 'recklessly and deliberately court a danger, the existence of which he recognised, by refraining from taking any measures to avert it', ie with the recognition of the danger to the vessel and not caring whether or not the danger was averted. The defendant did not discharge that burden.

[56] It is in evidence that very soon after the accident plaintiff informed the defendant and the defendant appointed an adjuster, the Mestari Adjusters Sdn Bhd, through whom a quotation for salvage work was obtained from a salvage company Many plus Sdn Bhd. The latter quoted a salvage cost of RM200,000 on no cure no pay basis but subject to two conditions. First, the insurer must pay the salvor directly. Second, the owner of the vessel must give

a letter of consent to commence salvage work. There is no evidence to show that the first condition was fulfilled by the defendant. There is also no evidence to show that plaintiff as owner of the Autorex 6 ever gave the consent letter mentioned. On the other hand, there is evidence to show that the plaintiff tried to negotiate the terms of the salvage with Manyplus pursuant to advice by Mestari, the adjuster. In a letter dated 4 November 1999 at p 11 of the Agreed Bundle B, Mestari Adjusters Sdn Bhd—the adjusters that was appointed by the defendant—advised the plaintiff to liaise with the salvor Marine Plus Salvage & Marine Works Sdn Bhd, on the terms and conditions of the salvage on an urgent basis to minimise loss. Two days later on 6November 1999, the plaintiff wrote a letter, at p 4 of Agreed Bundle C, to the salvor ManyPlus Salvage & Marine Works Sdn Bhd referring to the Mestari Adjusters letter of 4 November 1999 and requested that the salvor lower its salvage cost. But Manyplus refused to lower the salvage cost. In its letter dated 9 November 1999, at p 5 of Bundle C, the salvor gave the reasons for refusing to reduce its salvage cost as follows:

> Please understand the problem and the risk we had to take to undertake this operation. We had to bear for the high expenses involved especially the mobilization cost and professional divers fees involved should the operation be unsuccessful. These salvation jobs are also very time consuming considering the rough sea conditions which hampered the salvage operation. We are also having problem with lifting the barge as by then the mud had sipped into most of the barge's compartment through the leak hole. We had to dispose off the mud first and sealed the leak hole before pumping out the water inside the compartment. We are also uncertain of how many leak holes found on the barge.
>
> For your information, it is more complicated to salvage a barge and the chances of success are very low compare to cargo vessel.
>
> We hope with the above explanation, you will understand the problem we are facing and the reasons why we are unable to give you lower salvage cost.

[57] The defendant called only one witness — that is DWI, the loss adjuster with Mestari Adjusters Sdn Bhd, the adjusters appointed by the defendant. In his testimony, DWI said Autorex 6 was partially sunk at Kuala Semanok in Bintulu. But DWI did not know that personally. He did not and never did go to Kuala Semanok to personally investigate the sinking of Autorex. DWI said he assigned the investigation to his adjusters, in this case a person by the name of Simon Sinem who did visit the site on 28 October 1999 after incident and who interviewed PW1 the juragan. DWI also testified that the other subordinate of his to whom he assigned the case was his manager Lawrence Lim. DWI admitted in cross-examination he has no personal knowledge of the matter other then what Simon Sinem and Lawrence Lim had told him. In his examination-in-chief, DWI said that from the information gathered from the Juragan (ie PW1) 'we gathered that the vessel encountered rough seas about 4pm'.

[58] In his evidence in chief, DW1 said that his adjusters told him that the vessel Autorex 6 could be sighted to the aft cabin at low tide, Following this, DW3 expressed a belief that Autorex 6 could be salvaged when he said 'I think it is possible to savage the vessel'. But there is no evidence led to support this belief by DW3. In the first place DW3 could not himself verify the fact that the barge was salvageable. DW3 never visited the site. Secondly, after gathering the information, DW3 said that a report was prepared for the defendant, which, in DW3 owns words, are collective opinion after discussion. Unfortunately, the report was not produced in evidence, DW3 said the report was for the defendant; he could not produce it unless the defendant permitted him to do so. Thus, the court is put in the dark as to whether the defendant had been advised by DW3 or his company on the prospect of success of the salvage of Autorex 6. In any event, whatever views DW3 expressed in his testimony as to the possible success of the salvage operation seems to be directly opposite to the views express by his company Mestari Adjusters Sdn Bhd in a letter dated 15 March 2000, at p 16 of the Agreed Bundle B, addressed to the defendant. The letter was signed by Lawrence Lim, the manager of Mestari Adjusters Sdn Bhd. Para 3 of the said letter reads:

> 3 We had stated earlier that the site of incident is an open sea, a loading point for ocean going vessels. Sea and weather conditions thereat were quite unpredictable. Our enquiries revealed that after the incident involving insured's barge there are a few occurences of heavy thunderstorms which involved a few more marine casualties. We would like to highlight as a matter of fact that Bintulu/Kemena river mouth is a 'graveyard' for dumb barges with at least 6 to 7 dumb barges having sunk thereat and so far there has been no prospect of refloating despite attempted salvage operations mounted by the respective barge owners.
>
> This could be due to the shallow sea-bed which rendered salvage operations impossible as the site is inaccessible to deployment of heavy equipment.

[59] It can be seen from the comments contained in the said letter the salvage of Autorex 6 was almost near impossible.

[60] It is a known fact and not seriously disputed by the defendant that there are very few salvage companies in Bintulu that do salvage in open seas. For that matter on the evidence, I find that there are very few in the whole of Sarawak. The plaintiff had given evidence that when Manyplus refused to lower its cost, the plaintiff tried to enquire from friends and business associates who would be able to do salvage works. But the plaintiff testified that all of them, from whom he made the enquiry, either quoted the same price for salvage works or simply did not have the expertise and the equipments to carry out the works. It is also worth noting, in this regard, the comments made by the adjusters to the defendant in a letter at p 16 of Bundle B; and also by Manyplus in their letter to the plaintiff at p 5 of Bundle C as produced above. Perusal of these two letters showed that the general consensus is that the salvage work about to be undertaken was a very difficult one and had very

little chance of success. As for the plaintiff he gave evidence that it was in his interests to salvage Autorex 6 and he was all for it because the plaintiff said he could get an income of RM50,000 per month from the barge. All these are not challenged or contradicted by the defendant. Moreover, in their letter to the defendant at p 16 of Bundle B the adjusters Mestari agreed that the plaintiff had taken steps and measures to minimize loss.

[61] Therefore, I find that there is no breach of cl 11.1 — the sue and labour clause — by the plaintiff. The plaintiff had taken all reasonable steps to minimize loss; which in this instant case the main effort was to try and salvage the sunken Autorex 6.

[62] Still on cl 11.1 of the policy, it is contended by the defendant that it could avoid the policy if the plaintiff had breached cl 11.1. Since I have concluded that there is no breach of cl 11.1, this contention therefore fails. However for the sake of completeness, can such contention be supported in law? I think the authorities would show that such contention is quite untenable. I need only to refer to the case of *Gaunt v British and Foreign Insurance Company, Ltd and Standard Marine Insurance Company Ltd* (1920) 1 KB 903, where Lord Atkin at pp 916–917 said:

> There is one further point to which it is necessary to refer, It was contended by the Respondent that the appellant was under an obligation to take reasonable care that the goods should not be damaged by the negligence of appellant or his servant in protecting the goods from wet whether rain or sea water, he could not recover. I think two answers can be given to this. In the first place it appears to me that the insurers are liable for loss caused by the negligence of the assured or his servant unless the acts complained of amount to wilful misconduct of the assured (s 55, sub-s 2(a)). In the second place, in such case the onus would be on the insurer to establish such a cause of loss and such onus was not discharged. I do not think that the provision of s 78 sub-s 4, modify the provisions of s 55 as is suggested as a possible view by the learned editor of *Arnould on Marine Insurance*, s799a. I think that the only effect of that sub-section is to impose a duty to sue and labour — a very restricted duty compared to the general obligation contented for.

[63] On appeal to the House of Lords in *British and Foreign Marine Insurance Company v Gaunt* (1921) All ER Rep 447, Lord Sumner at p 448 reaffirmed the decision of the Court of Appeal and this was what he said:

> It is the duty of the assured and his agent in all cases to take such measure as may be reasonable for the purpose of averting or minimising a loss: obviously refers to suing and labouring and cannot be read as meaning that if the agent of the assured are not reasonably careful through out the transit he cannot recover any thing to which their want of care contributes.

[64] Therefore on the authority of *Gaunt v British and Foreign Marine Insurance Co* (1920) 1 KB 903 that the insurer cannot avoid liability under cl 1.1.1 of the policy (which incidentally is a recast of s 78(4) of the Marine Insurance Act (1906) except on the ground of wilful misconduct of the assured and it is the

onus on the insurer to show that it was. The duty cast upon the plaintiff under cl 11 is a duty to sue and labour which is very restricted one. If the plaintiff can show that he has made the efforts as reasonable as he could under the circumstances, as in this instant case, he would have discharged that duty.

[65] For the above reasons and findings, I allow the claim by the plaintiff with cost. Cost is to be taxed unless agreed.

Plaintiff's claim allowed.

Reported by Lim Lee Na